called on the *voir dire,* and after making five challenges to the polls, challenged the array. The trial judge overruled the challenge to the array on the ground that no actual harm to the plaintiff was shown. *Held,* that the challenge to the array thus made should have been upheld. *Vermont Box Co. v. Hanks* (1917, Vt.) 102 Atl. 91.

The panel may be quashed when any of the members have been summoned at the instance of either party to the action. *Co. Litt.* 156 *a; Peak v. State* (1888, Sup. Ct.) 50 N. J. L. 179, 12 Atl. 701. Or when prejudice of the summoning or selecting officer is shown. *People v. Felker* (1886) 61 Mich. 114, 28 N. W. 83. Or when the panel is not summoned or selected in the manner required by statute. See *People v. Borgstrom* (1904) 178 N. Y. 254, 70 N. E. 780. Actual harm need not be shown. *Peak v. State, supra.* The proper method of attacking the panel is by a challenge to the array. *Borrelli v. People* (1897) 164 Ill. 549, 45 N. E. 1024. But it is well settled that a prior challenge to the polls is a waiver of any absolute right to challenge the array. *Forsythe v. State* (1833) 6 Oh. 19; *Mueller v. Rebhan* (1879) 94 Ill. 142; *State v. Taylor* (1896) 134 Mo. 109, 35 S. W. 92. And the courts have held strictly to this rule where the challenge to the array was based on a deviation from the statutory regulations for selecting or summoning the panel, being averse to overthrowing a decision because of a mere irregularity. *Page v. Inhabitants* (1843, Mass.) 7 Metc. 326; *State v. Clark* (1894) 121 Mo. 500, 26 S. W. 562; and see *Bergman v. Hendrickson* (1900) 106 Wis. 434, 82 N. W. 304. But the trial court may in its discretion allow a challenge to the array, after a challenge to the poll. Thompson, *Trials* (2d ed.) sec. 113; *Cox v. People* (1880) 80 N. Y. 500. And the intervention of a party in interest in the selection of the panel furnishes good reason for relaxing the strict rule. See *McDonald v. Shaw* (1700, Sup. Ct.) 1 N. J. L. 6; *cf. People v. Felker, supra.* The principal case held, in conformity with these principles, that once the trial court had decided in its discretion to consider the belated challenge to the array, the facts of the case should have caused it to sustain the challenge.

PRINCIPAL AND SURETY—DEFENSES OF SURETY—FRAUD UPON PRINCIPAL.—The plaintiff secured by fraud a stay bond from the defendant in a former action. On default by the principal he sued the surety on the bond, who sought to set up as a defense the fraud practiced upon the principal. *Held,* that the surety could not avail himself of such a defense before the principal had elected to avoid the contract, since the principal had the option to affirm the contract and sue for damages for the fraud. *Ettlinger v. National Surety Co.* (1917, N. Y.) 117 N. E. 945.

Failure of consideration in the contract between the creditor and the principal is a good defense by the surety. *Sawyer v. Chambers* (1864, N. Y. Sup. Ct.) 43 Barb. 622; *Gunnis v. Weigley* (1886) 114 Pa. 191, 6 Atl. 465. If a surety contracts in ignorance of duress practiced upon the principal, he may plead this as a defense, since it materially increases his risk. *Patterson v. Gibson* (1888) 81 Ga. 802, 10 S. E. 9; *Osborn v. Robbins* (1867) 36 N. Y. 365. On similar grounds, if the contract of the principal is secured by fraud, the surety should not be bound. *Putnam v. Schuyler* (1875, N. Y. Sup. Ct.) 4 Hun 166; *Bryant v. Crosby* (1853) 36 Me. 562. If denied this defense the surety is of course entitled to indemnity from the principal, who must then look to the creditor in an action for the fraud. This involves a quite needless circuity of action. The court in the principal case declares that the surety cannot be allowed the defense without holding also that it would bar any further action by the principal. But this seems an unnecessary dilemma. Besides the injury to the principal, the fraud was a distinct injury to the surety, since it substantially increased the risk that he

would be called upon to pay. He should be released on this single ground, leaving creditor and principal to work out their rights between themselves just as if there had been no surety.

REMOVAL OF CAUSES—SUIT BROUGHT IN COURT OF STATE OF WHICH NEITHER PARTY WAS AN INHABITANT.—A citizen of one state sued a citizen of another state in a state court of a third state. *Held,* that the defendant might remove the cause to the federal court for the district within which the suit was pending. *M. Hohenberg & Co. v. Mobile Liners, Inc.* (1917, S. D. Ala.) 245 Fed. 169.

An alien sued a citizen of Pennsylvania in a state court of Ohio. *Held,* that the defendant might remove the cause to the federal court for the district of Ohio within which the suit was pending. *Keating v. Pennsylvania Co.* (1917, N. D. Oh.) 245 Fed. 155.

An assignee of an alien sued a citizen of New Jersey in a state court of New York. *Held,* that the defendant could not remove the cause to the federal court for the District of New Jersey. *Ostrom v. Edison* (1917, D. N. J.) 244 Fed. 228.

The existing confusion on this general subject has arisen from the decision in *Ex parte Wisner* (1905) 203 U. S. 449, 27 Sup. Ct. 150. A provision of the federal Judiciary Act of 1887, as amended in 1888 (substantially re-enacted in sec. 51 of the Judicial Code of 1911), forbade the bringing of any civil suit in a federal district court in any district other than that of which the defendant was an inhabitant, except that where jurisdiction was founded solely on diversity of citizenship, the suit might be brought in the district of residence of either plaintiff or defendant. It was held in the *Wisner* case that this limitation applied also to removal, and that a suit between citizens of different states could not be removed to a court in which it could not originally have been brought. Though modified in one respect by *In re Moore* (1907) 209 U. S. 490, 28 Sup. Ct. 585, and though its soundness has been doubted by lower federal courts, the *Wisner* case has never been overruled. The *Hohenberg* case *supra* is directly in conflict with that decision, which is not noticed in the opinion, and no other authorities are cited. Section 29 of the Judicial Code, dealing with the procedure on removal, provides expressly and exclusively for removal to the federal court for the district in which the suit is pending. From this section, and the decision in the *Wisner* case, it apparently results that when a citizen of one state sues a citizen of another in a state court of a third state, the suit cannot be removed at all. There is, however, some authority for disregarding the limitation apparently imposed by section 29, and allowing the defendant to remove to the federal court in the district in which he resides. See authorities on both sides collected in *Eddy v. Chicago & N. W. Ry Co.* (1915, W. D. Wis.) 226 Fed. 120, 126.

Where suit is brought in a state court by an alien against a citizen in a state of which the latter is not an inhabitant, a similar conflict has arisen, both on the question of removal to the federal court in the district where the suit is pending, and on the question of removal to the district of the defendant's residence. Authorities on the former question are collected in the *Keating* case, *supra,* and on the latter in the *Ostrom* case, *supra.* On the one hand some courts have assumed that the rule of the *Wisner* case should be extended to suits to which an alien is a party, and that since under section 51 an alien is not entitled to sue a citizen in the federal court of any district except that where the defendant resides, such a suit cannot be removed to the federal court of any other district. It then seems to follow from the provisions of section 29 that when the suit is brought in a court of a state where the defendant does not reside it is not removable at all. This was the practical result of the decision in